

<sup>2</sup> Appellant's representative requested an oral argument. On May 13, 2010 the Clerk of the Board advised that oral arguments are held only in Washington, DC and that the Board was not responsible for any travel or incidental expenses related to attending. The Clerk asked appellant's representative whether he still desired oral argument and advised that, if he did not reply by May 28, 2010, the Board would decide the appeal as submitted on the record. The Clerk received no reply within the allotted time.

## **ISSUES**

The issues are: (1) whether appellant received a \$43,622.07 overpayment of compensation; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

## **FACTUAL HISTORY**

In 1990 appellant, a 33-year-old on-scene coordinator, filed a claim for compensation alleging that she developed a pulmonary condition in the performance of duty as a result of her exposure to fumes and gases at the White Chemical Superfund site. The Office accepted her claim for aggravation of asthma and for pseudotumor cerebri consequential to treatment. Appellant received compensation for wage loss on the periodic rolls.<sup>3</sup>

In 1998 appellant received a settlement of her third-party negligence claim arising from the chemical exposure. The settlement resulted in a significant surplus to be credited on future payments of compensation payable to her for the same injury. The Office, however, continued to pay compensation under the asthma claim.

On August 31, 2009 the Office issued a preliminary determination that appellant received a \$43,622.07 overpayment of compensation from February 12, 1999 to January 27, 2001 because she received compensation for her asthma claim when the surplus from her third-party recovery should have been credited against that compensation. It found that she was not at fault in the matter.

Appellant claimed that she never received compensation for her asthma claim after February 1999. She partially completed an overpayment recovery questionnaire<sup>4</sup> and requested a prerecoupment hearing. Appellant's representative disputed the amount of the overpayment and argued that recoupment would be against equity and good conscience and would otherwise defeat the purpose of the Act. He addressed appellant's income and expenses and noted that funds from her third-party recovery had to remain invested to provide benefits in her old age.

During a telephonic hearing on February 12, 2010, appellant testified that she had \$145,000.00 in a brokerage account from her settlement with the White Chemical Company. After the hearing, on March 15, 2010 the Office received copies of some of her federal income tax returns.

In a decision dated April 13, 2010, the Office hearing representative found that appellant received an overpayment of \$43,622.07 from February 12, 1999 to January 27, 2001. He found that she was not at fault. Noting that appellant's monthly household income exceeded her monthly household expenses by \$1,240.00 and that her resource base included \$145,000.00 in a

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<sup>3</sup> In another case, appellant sustained a low back strain in the performance of duty on December 28, 1990. The Office expanded its acceptance in that case to include depressive reaction, lumbar disc herniation and lumbar radiculopathy. The Office File No. xxxxxx871.

<sup>4</sup> She indicated that the current value of stocks and bonds was "to be submitted."

brokerage account, he denied waiver. The hearing representative found no evidence of detrimental reliance. Given that appellant had income and financial resources sufficient to repay the debt, the hearing representative determined that she should pay \$1,000.00 per month.

On appeal, appellant's representative contends that the Office hearing representative made his decision without all the relevant evidence. He argues that, by letter dated March 8, 2010, he submitted all of the information that the hearing representative had requested but that only the tax returns ended up in the record. Appellant's representative notes that the record contains no cover letter or other correspondence to indicate how that evidence was associated with the record. He argues that fundamental fairness requires the Board to remand this case to allow the hearing representative to consider all of the evidence prior to determining the appropriate amount of monthly withholding required to recoup the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

If an injury or death for which compensation is payable under the Act is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by her or in her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to her for the same injury.<sup>5</sup>

After the refund owed to the United States is calculated, the beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury. The Office will resume the payment of compensation only after the beneficiary has been awarded compensation which exceeds the amount of the surplus.<sup>6</sup>

When a beneficiary has received a third-party recovery resulting in a surplus, compensation payments are calculated and continue to be charged against the surplus, as are medical expenses that have been paid by the claimant and submitted for reimbursement.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant received a third-party settlement of her negligence claim resulting in a significant surplus to be credited against future payments of compensation payable to her under her asthma claim. The Office, however, mistakenly continued to pay compensation for that claim. Appellant has disputed receiving any compensation under her asthma claim since February 1999, but the record details every payment made under this claim, including the period of each check, the amount, the payment date, the check number and whether the check was

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<sup>5</sup> 5 U.S.C. § 8132.

<sup>6</sup> 20 C.F.R. § 711.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third-Party Subrogation Guidelines*, Chapter 2.1110.b(3) (March 2006).

cash or deposited. For example, on February 27, 1999 the Department of the Treasury issued a check in the amount of \$1,657.00 for the period January 31 to February 27, 1999 (check number 00004293). It issued another such check on March 27, 1999 for the next 28-day period. On April 6, 1999 it issued a supplemental check for \$26.04, representing the cost-of-living increase effective March 1, 1999. Appellant thereafter received periodic rolls payments of \$1,684.00 until the next cost-of-living increase became effective on March 1, 2000, after which she received periodic payments of \$1,729.00. She continued receiving these checks and negotiating them, until the Office stopped payments after January 27, 2001.<sup>8</sup>

The record therefore establishes that appellant received an overpayment of compensation. After being notified of her third-party recovery and after receiving the statement of recovery showing a surplus, the Office should have suspended compensation for her asthma claim and credited the surplus against that compensation until the surplus was fully absorbed. The Board has totaled the compensation for wage loss paid under the asthma claim from February 12, 1999 to January 27, 2001 and the amount comes to \$43,580.94.<sup>9</sup> During this same period, the Office also reimbursed appellant \$41.13 for eight prescriptions obtained in the latter part of 2000, bringing the amount of the overpayment to \$43,622.07. The Board will therefore affirm the Office's April 13, 2010 decision on the issues of fact and amount of overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>10</sup> The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>11</sup> If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or; (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>12</sup>

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00

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<sup>8</sup> Appellant was at the same time receiving periodic checks for her back claim, but for lesser amounts. For example, her January 29, 2000 payment under the asthma claim was \$1,684.00, while her January 29, 2000 payment under the back claim was \$1,470.74. The overpayment in question resulted from compensation paid under appellant's asthma claim.

<sup>9</sup> Only 16 days of compensation under the February 27, 1999 check counted toward the overpayment.

<sup>10</sup> 5 U.S.C. § 8129(a).

<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> *Id.* at § 10.434.

for an individual with a spouse or one dependent. This base includes all of the claimant's assets not exempted from recoupment.<sup>13</sup>

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).<sup>14</sup>

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.<sup>15</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

Because the Office found that appellant was not at fault in creating the overpayment, she is eligible for consideration of waiver, the basic test of which is whether she has income or financial resources sufficient for more than ordinary needs or is largely or solely dependent upon current benefit payments for the necessities of life.<sup>17</sup>

Recovery of an overpayment will defeat the purpose of the Act if two things are true: appellant needs substantially all of her current income (including compensation benefits) to meet current ordinary and necessary living expenses and her assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse. If one of these conditions is not true, then recovery will not defeat the purpose of the Act.

Appellant testified at the February 12, 2010 telephonic hearing that she still has \$145,000.00 in a brokerage account from her settlement with the White Chemical Company. This greatly exceeds the specified resource base and establishes that recovery will not defeat the purpose of the Act. This is so regardless of appellant's monthly income and expenses.<sup>18</sup>

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<sup>13</sup> *Id.* at § 10.436; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1) (October 2004); *see Eloise K. Hahn*, Docket No 01-1199 (issued June 25, 2002) (the employee's contribution to the Thrift Savings Plan and the contribution's earnings, are considered assets for purposes of determining waiver).

<sup>14</sup> *Supra* note 13 at Chapter 6.200.6.a(1)(b) (October 2004).

<sup>15</sup> 20 C.F.R. § 10.437(b).

<sup>16</sup> *Supra* note 13 at Chapter 6.200.6.b(3) (October 2004).

<sup>17</sup> *Id.* at Chapter 6.200.6.a.

<sup>18</sup> The record contains no evidence establishing that any of these assets are separately held by the spouse. *See Earl C. Poppell*, 39 ECAB 1455 (1988) (holding that the Office improperly included in the resource base the spouse's certificates of deposit, acquired by the sale of her separate property and thus retaining the character of separate property under California law).

Appellant does not contend, and the evidence does not establish, that she gave up a valuable right or changed her position for the worse in reliance on the overpaid compensation she received under her asthma claim. As recovery will not defeat the purpose of the Act and will not be against equity and good conscience, the Board finds that the Office properly denied waiver. The Board will affirm the Office's April 13, 2010 decision on the issue of waiver.<sup>19</sup>

Appellant's representative argued that the Board should remand this case because the Office hearing representative did not receive all the financial information submitted. The Board has reviewed the transcript of the February 12, 2010 hearing and the financial information for which the hearing representative held the record open for 30 days: documentation of the husband's Social Security disability payments; the most recent mortgage bill; home insurance bill; property tax bill; utility bills; credit card bills showing the monthly minimum; quarterly pharmacy printouts; car insurance bills and estimates of monthly gas and repair expense; brokerage account statement and an explanation from her financial adviser for the 70 percent drop in the value of her portfolio. Given appellant's testimony, under oath, that she still has \$145,000.00 left in her brokerage account from her settlement with the White Chemical Company, the requested financial information would be immaterial and would not prevent recovery of the overpayment. As noted, the Office has administratively determined that recovery will not cause hardship with such a resource base.

### **CONCLUSION**

The Board finds that appellant received a \$43,622.07 overpayment of compensation. The Board also finds that the Office properly denied waiver of the recovery of the overpayment.

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<sup>19</sup> The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled. 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because the Office could not collect the overpayment by adjusting later payments under the asthma claim, as the surplus was still being credited against that compensation, the Board lacks jurisdiction to review whether the hearing representative abused his discretion in requiring appellant to pay \$1,000.00 per month to repay the debt.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board